

REMARKS

Applicants have now amended the claims to delete the word "optimum" therefrom. It is believed that this amendment renders the Examiner's rejection of claims 1-8 under 35 U.S.C. 112, second paragraph, moot since these claims are now clearly definite and precise in calling for a density of not less than 1.033 g/cc. Those skilled in the art are clearly informed that the claimed composition is in compacted form having a density of not less than 1.033 g/cc.

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Applicants attach hereto a copy of the FMC brochure referred to in the previously filed Declaration of Ronald O. Richardson. Applicants regret any inconvenience caused by the apparent absence of the FMC brochure as an attachment to Mr. Richardson's previously filed Declaration. This brochure is submitted to provide support for use of the term "purified cellulose" in the specification and claims of the instant application.

The Examiner has further asserted that the term "purified cellulose" is indefinite. Mr. Richardson's previously submitted Declaration makes it clear that the term "purified cellulose" would be understood by those skilled in the art as referring to cellulose subjected to hydrolysis and purification and differing from microcrystalline cellulose. This definition of purified cellulose is supported by the FMC brochure filed herewith and referred to in Mr. Richardson's Declaration.

Reference is also made to the attached Declaration of Dr. Brian T. Forschler, a highly accomplished entomologist. In paragraph 3 of his Declaration, Dr. Forschler expresses his opinion that persons skilled in the art of preparing termite bait compositions would have the knowledge required to determine the density of compacted compositions. This opinion is submitted to effectively rebut the Examiner's statement that there is no identification in the claim as to what constitutes the basis for determining the recited density. Clearly, one skilled in the art and having applicants' disclosure before him would know how to determine the density of a compacted composition and whether such density is greater than approximately 1.033 g/cc, the numerical standard set forth in claim 1.

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Reconsideration is respectfully requested of the rejection of claims 1-6 and 8 under 35 U.S.C. 102(e) as anticipated by, or in the alternative, under 35 U.S.C. 103(a) as obvious over the Richardson et al. U.S. patent no. 6,416,752. It is respectfully submitted that the subject matter of claims 1-6 and 8 is novel under 35 U.S.C. 102(e) and nonobvious under 35 U.S.C. 103(a) over the Richardson et al. reference.

The present invention is directed to a composition in compacted form for use for monitoring and controlling termites comprising a specified cellulose material as a base bait, the composition being compacted to a density of not less than approximately 1.033 g/cc. Through the nonobvious discovery by applicants that compacting such a composition to a density of not less than 1.033 g/cc, applicants achieve heretofore unrealized maximum loading of termite bait stations resulting in an extension of the time period needed for monitoring and filling the bait stations. This in turn permits substantially greater loading of monitoring and control bait into current commercially available termite bait stations than current commercial baits. As shown in Mr. Richardson's previously filed Declaration, the present invention maximizes the amount of bait which may be loaded into a termite bait station as a result of being compacted to a density of not less than 1.033 g/cc through the present invention.

The Richardson et al. '752 patent is concerned with an improved termite bait composition comprising a powdered cellulose attractant having a particle size in the range of approximately 1 to 100 micrometers and a termite killing agent. Richardson et. al (col. 2, lines 65-67) generally discloses that the termite bait composition may be compressed into tablets, but fails to provide any information or direction whatsoever to those skilled in the art as to the density to be achieved or the degree of compaction required to obtain the advantages realized through the present invention.

The Examiner concedes that "density is not disclosed" in Richardson et al., but contends that "optimization is, at bottom of col. 2". All that is expressly disclosed at the bottom of col. 2 of Richardson et al. is that the termite bait composition may be compressed into tablets or granular form for placement in a termite bait station. This disclosure contains no mention of optimization in any form, nor does it recognize density as a result effective variable. The Examiner also refers to col. 3, top as disclosing that "the powdered form is optimal for use on fresh condition in bait stations".

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The top of col. 3 merely discloses that the termite bait composition of the invention prepared as previously described is packaged in a termite attractive package such as a paper bag, cardboard tube or other cellulosic container which may then be dropped into or placed in a termite bait station without being opened. Again, Richardson et al. make no mention of optimization of density.

The Examiner further refers to Example 1 of Richardson et al. as disclosing that "the particle size of 20-100 microns was optimal as feeding attractants over pine wood". This portion of Richardson et al. emphasizes the fundamental fact that Richardson et al. are concerned with the particle size of a termite bait composition and do not disclose or provide any suggestion concerning the compacting of a termite bait composition to a density of not less than approximately 1.033 g/cc.

With respect to the Examiner's rejection of claims 1-6 and 8 as anticipated by Richardson et al. under 35 U.S.C. 102(e), it is well settled that for a prior art reference to anticipate a claim, the reference must disclose each and every element of the claim with sufficient clarity to prove its existence in the prior art. *Motorola, Inc. v. Interdigital Tech. Corp.*, 43 USPQ 2d 1481, 1490 (Fed. Cir. 1997) and *In re Spada*, 15 USPQ 2d 1655, 1657 (Fed. Cir. 1990). Also, the prior art reference must describe the applicant's claimed invention sufficiently to have placed a person of ordinary skill in the field of the invention in possession of it. Although this disclosure requirement presupposes the knowledge of one skilled in the art of the claimed invention, that presumed knowledge does not grant a license to read into the prior art reference teachings that are not there. In the present instance, it is clear that the Richardson et al. reference fails completely to disclose the differentiating element of claims 1-6 and 8, namely, that the claimed composition is compacted to a density of not less than approximately 1.033 g/cc. Accordingly, the rejection of claims 1-6 and 8 as anticipated under 35 U.S.C. 102(e) by Richardson et al. should be withdrawn.

The subject matter of claims 1-6 and 8 is also submitted to be nonobvious over Richardson et al. under 35 U.S.C. 103(a). As has been pointed out earlier, Richardson et al. is devoid of any teaching or suggestion that a termite bait composition could be desirably compacted to a density of not less than approximately 1.033 g/cc. In this regard, applicants note that the Examiner's statement that "any change in density or

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form can be performed at the will of the artisan, to provide more or less dense tablets, in order to optimize handling by applicator, size for ready release upon termite feeding, of the powdered constituents, stability, resistance to termite feeding in order to minimize particle or powder consumption" is not based upon any specific teaching or suggestion in Richardson et al. The Examiner simply does not advance any basis on which one skilled in the art would consider the present invention obvious in the light of the disclosure of Richardson et al.

Moreover, it is not believed that the Examiner has approached the issue of obviousness from the vantage point of "at the time the invention was made" as required by Section 103. Close adherence to this statutory language is especially important in the case of less technologically complex inventions, where the very ease with which the invention can be understood may prompt one to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher. *In re Dembiczak*, 50 USPQ 2d 1614, 1616-17 (Fed. Cir. 1999).

On this issue of obviousness, the Examiner's attention is directed to the attached Declaration of Dr. Brian T. Forschler. As attested to by his curriculum vitae, Dr. Forschler is a highly qualified entomologist who has conducted research in the field of entomology for many years. In paragraph 2 of Dr. Forschler's Declaration, there is set forth the details of a wagon wheel choice test carried out by Dr. Forschler to determine the feeding difference in feeding termites three different baits, i.e. pine wood, powdered cellulose and a compressed cellulose bait matrix prepared in accordance with the present invention, the latter having a density of 1.1 g/cc. In this choice test, the three different test materials were placed in different, separate arenas, the pine wood in one container, the loose powdered cellulose in a second container and the compressed cellulose tablet of this invention in a third container. Each of these containers was then attached to a central container by means of tubing. Termites were released into the central container and could freely choose which of the other three containers they wish to visit and the food material they want to feed on. Attached to Dr. Forschler's Declaration is a graph illustrating the test results and the feeding difference between pine wood, powdered cellulose and the compressed cellulose tablet made in accordance with the present invention. As can be seen, the compressed cellulose

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tablet was highly preferred by the termites over the other two choices. Such results are submitted to be unexpectedly good and beyond what one skilled in the art would expect from compacting a termite bait composition to a density of not less than approximately 1.033 g/cc.

The Examiner has emphasized that applicants have not provided "any objective evidence of criticality, non-obvious or unexpected results". It is respectfully submitted that the Declaration of Dr. Forschler provides such objective evidence of non-obvious results which flow from the practice of the present invention and that one skilled in the art would not have predicted that cellulose tablets compressed or compacted in accordance with the present invention would have been as highly preferred by termites over pine wood and powdered cellulose. As was proclaimed in *In re Aller*, 105 USPQ 233, 235 (CCPA 1955) it is to be normally expected that a change in temperature or in concentration, or in both, would be an unpatentable modification. However, as held in *In re Antonie*, 195 USPQ 6, 8 (CCPA 1977) patentability may be imparted if the results achieved at the designated concentrations are "unexpectedly good". It is submitted that this holding is directly supportive of the patentability of claims 1-6 and 8 by reason of the showing made by Dr. Forschler's Declaration.

For all these reason, claims 1-6 and 8 are submitted to be clearly novel over the Richardson et al. reference under 35 U.S.C. 102(e) and also manifestly non-obvious over the Richardson et al. reference under 35 U.S.C. 103(a), particularly in the light of the showing made in Dr. Forschler's Declaration.

Reconsideration is also respectfully requested of the rejection of claims 1-8 under 35 U.S.C. 103(a) as unpatentable over the Richardson et al. reference in view of Minagawa et al. U.S. patent no. 5,096,710. It is respectfully submitted that these references, whether considered alone or in combination, do not render obvious the subject matter of claims 1-8 within the meaning of 35 U.S.C. 103(a).

The deficiencies of the Richardson et al. reference have been discussed above, it being particularly noteworthy that Richardson et al. do not disclose any specific compression data for compositions compressed into tablets and likewise provide no clue that any advantage would flow from compacting a bait composition to a density of not less than approximately 1.033 g/cc (or 1033 kg/cm²).

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The Minagawa et al. reference discloses (col. 4, lines 8-18) the preparation of poison bait compositions by mixing one or more insect-growth controlling agents with dextrin, plant oil and a feeding attractant to make a uniform mixture which is then tableted by a per se conventional procedure to give a bait composition in a tablet of desired size normally under a pressure of about 10 to about 500 kg/cm². These tableting pressures are much lower than the pressures of not less than 516 kg/cm² used in Example 1 of the present application and capable of producing compacted compositions having a density between approximately 1.033 g/cc and 1.377 g/cc as in the present invention as defined in claim 7.

The Examiner states that in the Minagawa et al. reference the "resulting tablets are 1.33 g/cc (lines 47-50) and are optimized to prevent cracking". The Examiner is believed to be in error since applicants have been unable to find the number 1.33 g/cc anywhere in the Minagawa et al. reference. In Examples 1 to 6 of Minagawa et al., the mixture recited was tableted under a compression of 15 kg/cm² to make tablets, a pressure far below 516 kg/cm² which is the minimum pressure utilized in the present invention. The Examiner is therefore believed to lack support for his conclusion that it would have been obvious to one of ordinary skill in the art desiring to utilize compressed baits "to use any of recognized means, including those of Richardson, with particular density achieved as shown in normal tableting procedures, in order to optimize bait to control the target pest of concerns". As has been shown, the tableting procedures set forth in the Richardson et al. and Minagawa et al. references are far removed from those of the present invention insofar as compacting pressure or the density of the compacted composition is concerned. Moreover, neither reference provides any teaching or suggestion for modifying the compacting pressure or density parameters set forth to approach those utilized in the present invention. Finally, applicants have now submitted the Declaration of Dr. Forschler as a showing of "unusual or unexpected results" seemingly required by the Examiner. Contrary to the Examiner's assertions, the "compression features and bait form" are not known by the skilled artisan since the claims herein recite a specific density level which is neither disclosed nor suggested by the prior art. Furthermore, through Dr. Forschler's

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Declaration, applicants have now provided objective evidence of non-obvious and unexpected results.

Applicants take issue with the Examiner's contention that the "instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by known art recognized methods to achieve improved fly control as is well known in the art". Claims 1-8 specify that the composition defined is compacted to a density of not less than approximately 1.033 g/cc which is not an art recognized method. The prior art in fact contains no inkling that the outstanding preference shown by the studies set forth in Dr. Forschler's Declaration could be achieved by compacting bait compositions to the specific density level required by the claims.

Accordingly, under any fair reading of the disclosures of the Richardson et al. and Minagawa et al. references, it is respectfully submitted that claims 1-8 define subject matter which is manifestly nonobvious over these references and therefore should be allowed.

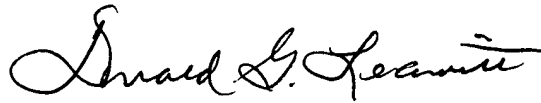
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CONCLUSION

In view of the foregoing, favorable reconsideration and early formal allowance of claims 1-8 are respectfully requested.

The Commissioner is hereby authorized to charge any underpayment and credit any overpayment of government fees to Deposit Account No. 19-1345.

Respectfully submitted,

A handwritten signature in cursive script, reading "Donald G. Leavitt".

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*Attachments